No. 6771

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF AND ARGUMENT FOR APPELLEE.

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I.

Statement of the Case.

The statement of the case in Appellant's Brief is a bare outline of the pleadings and evidence.

As suits for penalties under the Safety Appliance Acts depend to so great an extent on the facts peculiar to the individual case we shall state the facts more fully under appropriate divisions of the Argument hereinafter made.

The case was tried before Hon. Frank H. Norcross, United States District Judge, sitting without a jury. He filed a written opinion (Rec. pp. 24 et seq.) in which he summarized the evidence, pointed out that each case of this character must be decided on its peculiar facts, analyzed the Supreme Court and other Federal Court decisions relied on by the plaintiff and concluded "that 'the essential nature' of the movements in question was switching and not train movements". Judgment for defendant was accordingly ordered and entered.

II.

Question Involved.

The sole question involved is whether the trial court was correct in coming to the conclusion next above quoted from his written opinion.

III.

Argument.

While the facts may appear somewhat involved to one unfamiliar with railroad operation in general and that of the defendant's San Francisco Yard in particular, they may be divided for clearer understanding and for separate discussion and application into two main groups:

(1) The "essential nature of the work done," the manner of doing which is complained of; and

(2) The evidence as it bears on the comparative safety, in the circumstances, of the work done.

Other points not requiring a discussion of the facts are separately treated.

The only intermediate error specifically assigned will be discussed in Subdivision 5 of this chapter.

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1. "The Essential Nature of the Work Done" Shows That the Movements Were Not Train Movements.

The only movements complained of were over the track shown in green on Plaintiff's Exhibit No. 1, a copy of which we append to this brief.

That track was not a main line track, nor used for that purpose. It was a "drill" track used for switching operations and for connecting two units of the yard used for distinct purposes. The "movement of cars" (complained of in each count) was "on a line which has no other connections except with switching tracks and which line in purpose and reality is but an extension of such switching tracks" (Trial Court's Opinion, Rec. p. 30).

Although no cars were set out of a drag or picked up by it during the time it was on the green track it is clear that each movement over that track was merely part of a

unitary movement, the sole purpose of which was to switch, assemble or classify cars.

Therefore, as found by the trial court (Rec. p. 32) "'the essential nature' of the movements in question was switching and not train movements".

Thus, while plaintiff's Inspector Engles testified as to the beginning and end of each movement on the green track, he did not tell, because, as he said, he did not know, what became of the cars when the unit left the "green track". It is apparent from his testimony that as a part of and at the end of the movements that entered both areas the unit in each case was distributed and placed on different tracks (Rec. pp. 42, 43, 44, 45). *It is also apparent that that was done by the same locomotive and was an essential part of a continuous switching operation that was in part only over the green track.* It is certain that none of the movements in question was of a drag that came from the Bay Shore area of the yard where freight trains are made up and broken up (Rec. p. 53), although some of those drags from the Bay Shore go into Area "A" as well as Area "B" (Rec. p. 55). We say this, first, because "the track that the so-called Bay Shore drag uses is not the same as this switching drag was operated on that the complaint refers to" (Rec. p. 55), i. e., the green track; and, second, because Trainmaster Hopkins testified without contradiction (Rec. p. 64):

> "The air is coupled on all drags between all units of the San Francisco yard and Bay Shore;

> they use the main line from a point near Sixteenth Street to Bay Shore; there is a filled-in trestle across the channel."

An inspection of the map (Plaintiff's Exhibit No. 1), a copy of the relevant portion of which follows this brief under the same cover, will do more to fix in one's mind the physical facts of the portion of the San Francisco yard where the movements occurred than several pages of explanation. Probably the reader of this brief can best orient himself by the Southern Pacific passenger station at Third and Townsend Streets, which is shown on the map and so marked, and by the red line on the map which represents a part of the double track main line over which Southern Pacific passenger trains arrive at and depart from that station. The area marked "B" which is grid-ironed with parallel tracks and extends southwesterly from the passenger station is described by Trainmaster Hopkins as follows (Rec. p. 55):

> "The green track is what I refer to as the drill track. The lines shown on Exhibit No. 1 that connect with the green track and northeast of it, through blocks 130, 132, 134, etc., are industry tracks; they are strictly industrial tracks, spurs, for the purpose of serving industries with cars and taking cars away after they are loaded; they are in no sense main line tracks. Except for the banana train, none are made up in the area shown on this map."

He further testified (Rec. p. 62):

"Now, as to the area marked 'B', that is used for other purposes. The territory in 'B' is more of a freight shed territory, and other industries, of course, that are reached in that territory, as well as the tracks that are known as 47 and 48, which are used as an assembly track; in other words, cars in this territory, as they are taken out, are thrown over there, and as they assemble into a suitable drag they are taken to Mission Bay for movement and connections, or to Bay Shore for train movement. Taking a typical case for illustration: Suppose a drag of twenty cars comes from Bay Shore and goes through Tunnel No. 2 and Tunnel No. 1 and leaves the main line track just south of Barstow Street; it does not touch the green line track coming from Bay Shore; then supposing, in that drag of twenty cars, we have some of them that are to be taken across San Francisco Bay by the car ferry, and some of them that are going to the Santa Fe, and some of them that are going to these sheds E, F, and G, shown in the area marked 'B', that drag of twenty cars would be segregated in the area marked 'A' and the cars that went to the Santa Fe would be transferred to it, and those that were to go up to the area marked 'B' would be taken to it over the green line. Now, taking a typical drag of cars moving from 'B' to 'A' over the green line; they might consist of several different classes of cars, some to go across the bay on the car ferry, some to be transferred to the Santa Fe, and some to the Western Pacific, and some to the Belt Line. The reason for taking them there is that that is the

> segregating point for San Francisco cars; it would not be possible to do the segregating at the area marked 'B'."

Area "A", as to some extent explained in the quotation next above, is devoted to somewhat different uses than Area "B". It will be seen that it is connected with the remainder of the yard by several tracks — one of which is the green track, — that it adjoins warehouses, and that track connections are afforded from it to the Santa Fe railway yards, the Santa Fe freight slip, the freight slips of the Southern Pacific, as well as the "Belt Line"—the State owned terminal railroad that serves the piers shown on the map and also the industries that have spurs springing from the Belt Line.

Area "A" was described by Trainmaster Hopkins (Rec. p. 60):

> "The area of tracks used by the railroad and marked 'A', is for assembling cars from industrial sections, transfers, and from boats arriving in Mission Bay slip into drags, where they are taken to Bay Shore and segregated for train movement. There are three different units in that system of tracks in the area marked 'A'. There is what we call the Elliott yard, there is the hay yard, and there is the Mission Bay unit. These units are all in the Mission Bay area. There are also industrial tracks in the district down in the vicinity of the channel. In addition to that, there is a system of team tracks in what is known as the hay

yard. That is all reached from this point here—that is an extension of the green line. These tracks are also used for preparing cars for special commodities, such as for sugar. They are also used for cars to be transferred to the Atchison, Topeka & Santa Fe Railroad; the segregation is made at that point. The extension of the Santa Fe tracks, where their switching is done, is shown on the map, just west of Piers 48 and 50; it goes on down. Their particular yard is in China Basin. All cars received from the Santa Fe, and also from the Western Pacific, and also from Southern Pacific boats through the point shown as S. P. Ferry Slip, are segregated into drags in this Mission Bay area, and hauled in solid drags to the Belt Line Transfer. That includes cars that arrive through those agencies that are delivered all the way from Townsend Street to Fort Mason. Fort Mason is not shown on this map; it is north of the portion shown as Union Ferry Station."

He further described Area "A" by saying (Rec. p. 62):

"The railroad term 'classification' as applied to freight *cars* [yards] is that portion of the yard that is used for segregating cars to units for different train movements, for delivery to other carriers, and with boat connections, and rail connections. I would say that it would be very proper to call the area marked 'A' a classification unit or area."

Thus it is clear that areas "A" and "B" are not,—as is stressed in some of the cases hereinafter discussed,—sepa-

rate and distinct "yards". Each area has its different uses appropriate to its location, distinct from the other area and necessary to a complete "yard" at a terminal such as San Francisco.

Now, as to the green track and its uses.

Trainmaster Hopkins, concurred in by General Yardmaster Selden (Rec. p. 73) characterized the green track as a drill track, saying (Rec. p. 55) that there are three drill tracks paralleling the main (red) track, and that

> "What I mean by a drill track, is a track that is used for switching purposes, drilling back and forth, and from which spur tracks and industries are taken off; that is, to be distinguished from the main line track; that is, an inside track that is independent of the main line track entirely, and on which no movements of main line travel are made. The track shown in green in Exhibit No. 1 is the connection between the area marked 'A' and the area marked 'B'; that was also true in November, 1930, and also before and since then; it was not used as a main line track in whole or in part; it is entirely separate and distinct from the main line track. The green track is what I refer to as the drill track."

He further said (Rec. p. 63):

> "As to the necessity or convenience to go upon any main line track in going from 'A' to 'B', or from 'B' to 'A', there is no point that you can go from this drill track to the main track, except

> through the connection which is in the vicinity of Sixteenth Street; it is shown in a black line, just about east of Block 32. There is no connection between King Street and Sixteenth Street, between this drill or any of the drills and the main tracks. By 'this drill,' I refer to the green line as shown on Plaintiff's Exhibit No. 1, for the reason that *there is another drill track between this green line,—that is shown in the black line on this Exhibit—and the red line, which is the track that is used by Bay Shore drags going direct from Sixth Street to Bay Shore."* (*Note:* air is always coupled in those drags; Rec. p. 64.)

It is also beyond question in this case that the green drill track is customarily used for switching purposes, and is not merely a connection between "A" and "B".

As to its use for switching purposes, Trainmaster Hopkins said (Rec. pp. 56-58):

> "As to the use of the west end of this green line for switching purposes, that is, the end nearest Sixth Street, that is a territory that serves the freight sheds; in addition to that, it serves industries that reach down as far as Third and Berry Streets, Third and Channel, which can be identified as the Southern Pacific Terminal Building. In the territory between that and Sixth Street, there are several spurs serving lumber yards, rock bunkers, and sundry industries in the territory. This green line is used by engines in switching for the sheds, and in making what we would call a double freight movement, doubling from

one track to another. On drags of thirty cars, the engine would be approximately half of the distance on the straight green line between 'B' and 'A'. That would be about between Irwin and Hubbell. In the reverse direction, an engine switching or doubling a long drag in the part marked as 'A', —if it were possible for the two of them to be working on that lead at the same time, the engines would almost come together on the green line; it is a single track lead there. There are three tracks in there; the No. 2 lead is next to the main track; the No. 3 lead is the lead that is used to Mission Bay; No. 4 is a drill lead off which these spurs lead that you asked me about a few minutes ago; that is only used as an emergency lead; this is a single track lead in the movements that are referred to. In November, 1930, prior thereto and since, the green line tracks have customarily been used in these switching operations that I have been describing; for a period of years there has been no change in the movements there.

When I speak of doubling over,—I mean by that, taking a drag of twenty cars, that ten cars might be on one track and ten on another in the area marked 'B'; in other words, the engine has to pull maybe ten cars off one track and pull them out a sufficient distance to get over the switch and throw the switch, and then back up on the others to complete the drag."

He further said on cross-examination (Rec. p. 68):

"It is a fact that all of the movement of cars from the area that is marked 'A' to and from the

area marked 'B' are made over the green track, but that track is also used as a switching lead to both 'A' and 'B'. As to what I mean by a 'switching lead': A drag that is being switched in the portion shown as 'A', or Mission Bay, with a number of cars, will be half way down this track between 'A' and 'B' in a switching movement or moving from one track in 'A' to another track in 'A', in making a move. What I mean by that is this: We will pull, say thirty cars out of 'A' from probably different tracks, or probably make a straight move from one track in 'A' to another track in 'A'. In making that move, the engine will be half way down the same track in a straight line between 'A' and 'B' in order to make the move. In making a similar move in 'B' the same condition would exist; that is, a car movement may be made out of 'A' onto that track shown in green, the locomotive proceeding about half way, and then these cars may be backed into the area 'A' again onto another track; and a like movement may be made in the area 'B'. There is a parallel track to the green track that has spur track connecting, but not with the green track."

The use of the green track is further summarized by Trainmaster Hopkins on page 70:

"Cars are moved in drags, or transfers, or whatever they may be called, from the area marked 'B' to the area marked 'A', for the purpose of segregation into drags at Mission Bay area for delivery to connecting lines, and for movement from Mission Bay to Bay Shore for

train movement, as well as for delivery to industries in the Mission Bay area, or vice versa.

Cars moving in the reverse direction, that is from 'A' to 'B', are cars that are brought in in drags from Bay Shore and Mission Bay, *segregated for delivery to industries or sheds; also cars received from connecting lines through the transfer, as well as by boat from Oakland and Sausalito.*"

It is clear that *any movement over the green track was merely part of a switching, classification, assembling or breaking up movement* and the trial court in effect so found.

The engines specified in the complaint were switch engines, used for no other purpose. The drags were not scheduled time table movements nor made under the direction of a train dispatcher nor handled by road crews, the crews that handled them being yard crews (Rec. p. 56). They were not furnished with cabooses nor did they carry markers—either lanterns or flags (Rec. pp. 49-50).

We respectfully submit that the facts show that the movements in question were not "train" movements as that term has been explained in the decisions of the federal courts, the relevant ones of which are succinctly analyzed in the opinion of the learned trial judge (Rec. pp. 24-32).

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2. Comparative Safety of the Movements Complained of.

We are somewhat at a loss to understand the theory of counsel for the appellant with respect to the safety features of the case. They assign error "relating to the admission of testimony as to the greater degree of safety in operating these transfer movements without the use of air brakes than with such use" (Appellant's Brief, p. 24)—which we discuss later in this brief, then immediately invoke the judicial notice of this court "that on certain occasions San Francisco is enveloped in a dense fog that makes all kind of traffic hazardous, particularly railroading", and close their brief (Appellant's Brief, pp. 25-26) with a discussion of the relative lengths of time within which a drag of cars can be stopped with power brakes or with engine brakes alone, concluding the argument with the statement:

> "All of the cars involved were equipped with air brakes and all that would have been required to have all of the air brakes under control of the engineer was to couple the air hose between the various cars and the locomotive."

The last quoted statement is somewhat obscure. In order to have power brakes operative throughout the entire length of a cut or drag of cars it is necessary that the hose be coupled not only between the engine and the front end of the head car, but also between the rear end of that car and the head end of the car immediately

behind it, and so on throughout the length of the collective unit, and then close the angle cock on the rear end of the rear car to prevent the escape of the compressed air through the entire drag. Such connections are made by hand—not automatically as is the case with car couplers—and that is one of the main reasons why courts have exempted switching movements, movements in making up and breaking up trains, etc., from the power brake provisions of the act.

At the trial counsel for appellant were careful to prove that certain streets were crossed at grade and the extent of the protection given by human flagmen (Rec. p. 43), as well as the hours the flagmen were on duty (Rec. p. 46). On this appeal, however, they argue, citing *Louisville & Jeffersonville Bridge Company v. United States,* 249 U. S. 534, 63 L. ed. 757, that, to use the language of the Supreme Court in that case:

> "But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law, and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply, and that failure to comply will not be excused by carefulness to avoid the danger which the

> appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act."

As an abstract statement of law the quotation would commend itself even without the supreme authority of the court that uttered it. But it comes at the end of a detailed discussion of the operation there condemned, all to the point, as stated by the Supreme Court at the end of the discussion, that "these suggestions serve to emphasize the dangerous character of the movement". So it will be found in almost every case cited by counsel or appearing in the books wherein a given operation has been held to have required the coupling of air hose and the operative condition of the power brake. Those discussions have not been to justify the existence of the act; its justification under the police power of the nation and the Commerce Clause was judicially settled soon after its enactment. Rather have those discussions been in an effort to determine from the surrounding circumstances whether the movement under consideration was that of a *train* as Congress used that word, and in an effort to apply to the case considered the rule laid down in *United States v. Chicago, B. & Q. R. Co.,* 237 U. S. 410, 413, 59 L. ed. 1023, 1027, approved in the *Louisville & Jeffersonville Bridge* case, supra, that:

> "* * * the controlling test of the statute's application lies in the essential nature of the work done."

It is more convenient and more expeditious for a yard crew in handling two or more cars in a switch drag or in a movement incident to the making up or breaking up of trains or the spotting of cars on spur tracks for unloading, or at industry or warehouse platforms for the same purpose, to do so without coupling the air, a process which necessitates manual coupling (connecting) of the air hose between all of the cars at the time the drag is made up and manual uncoupling and re-coupling to afford a continuous air line each time the drag is broken and a car set out of or added to the collective unit. It is also true that operation of drags without coupling the air hose is less expensive. Counsel intimate (p. 26) that it is not. Their intimation is "off the record", so that we feel free to say that unnecessary coupling of air creates an added and locatable out-of-pocket wage expense in addition to that incident to delay. As to that we have something to say in the next subdivision of this chapter, but the element of hazard involved in operating a drag of cars without coupling the air in a territory where the hazard of collision is ever present or unusually frequent is often—and properly so—a determining factor in the railroad operating officials' instructions to yard crews on the subject. The incentive is not theoretical. If an accident occurs which results in personal injury to or death of an employee and is fairly attributable to disobedience of the Safety Appliance Acts by the employer, the financial penalty is far more severe than that for a violation of the act itself. Section 7 (U. S. Code, Title 45, sec. 7) provides that:

> "Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

Then, too, the effect on a railroad defendant where in an action for damages such as a grade-crossing case a violation of the Safety Appliance Acts is proven to have been a contributing cause, no matter how slight, is too well known and too serious to require more than its mere mention here.

So that, while switching operations may legally be carried on without coupling the air and for some distance on a genuine main line, provided they are true switching operations, and while true "making up" or "breaking up" operations may be similarly carried on without coupling the air, it is not considered good railroad practice so to do where other tracks are available; and while a "train", within the meaning of the Safety Appliance Acts, may be operated on a non-main line track, such is not the practice.

It has naturally followed that in all or almost all of the reported cases the courts have taken into consideration the hazard, and particularly the main line movement, involved, not as controlling the decision,

but as in large measure determining what the Supreme Court has described as "the essential nature of the work done."

It is therefore entirely legitimate in the instant case to call attention to the lack of hazard in the challenged operations over the green line shown on Plaintiff's Exhibit No. 1, not because the character or extent of hazard controls the case itself but because the hazard or comparative lack of hazard in an operation is a strong indication of and one of the prime factors in determining "the essential nature of the work done". The courts have evidently and properly assumed that railroad operators and their legal advisors from selfish as well as humanitarian motives try to observe both the spirit and the letter of the law in classifying operations that are not distinctly and unquestionably, regular "train" operations.

In the preceding subdivision we summarized the testimony as to the reason for and essential character of the movements; we will now abstract that relating to any hazard inherent therein or incident thereto. The instant case is freer from such hazard than any of the reported cases.

The route traversed was over the "drill track" (Rec. p. 55) shown in green on Plaintiff's Exhibit No. 1 (copy appended hereto). That track is "not used as a main line track in whole or in part; it is entirely separate and distinct from the main line track" (Rec. p. 55) which is shown in red on that exhibit. The

tracks shown as connecting with the green track "are in no sense main line tracks" (Rec. p. 55). The streets crossed by the green track at grade are for the most part in the category of "paper streets" so far as arterial use is concerned. Inspector Engles described them (Rec. pp. 43, 44, 45) but did not go into details concerning them. Trainmaster Hopkins said of them (Rec. pp. 58-60):

> "As to the form of crossing watchman protection at the main streets, beginning at Sixth Street: At Sixth Street, ordinarily, the engine in starting from that territory would be south of Sixth Street proper; after leaving Sixth Street the first crossing that is made from between the freight sheds is Berry Street; at this point there is a crossing watchman between seven A. M. and six P. M. The next open street is Hooper Street; there is no protection at that crossing. The travel on Hooper Street is negligible; the same applies to Irwin, Hubbell and Daggett; the company maintains crossing watchmen at Irwin and *Hubbell* (later, p. 67, corrected to "Hooper") Streets, but not at Daggett. Barstow comes into Sixteenth Street and is not across the tracks. There is a flagman for twenty-four-hour periods at Sixteenth Street. Continuing around, you again cross Sixteenth Street at the mouth of Mission Bay, where there is a twenty-four-hour watchman service.
>
> As to the character of the travel on Irwin, Hubbell, and Daggett Streets, as shown on Plaintiff's Exhibit No. 1: In the morning, probably from seven to nine, there will be a few truck movements

reaching industries that are in the territory served by the spur tracks shown on this map. Again, there will be infrequent movement over these tracks throughout the day.

The viaduct over Sixteenth Street is shown with approximate correctness on Plaintiff's Exhibit No. 1. That viaduct was built through a franchise arrangement; am not sure of the year, but I think it was around 1914. It was made to direct the traffic away from the grade crossing on Sixteenth Street, which is continuously blocked by our engines in switching Mission Bay; we block Sixteenth Street as much as thirty minutes to an hour at a time. That is the street with the greatest volume of traffic in that neighborhood. Berry Street in the early morning is a heavy traveled street and is busy. There is nothing to prevent the driver of trucks or other vehicles from using this viaduct when the crossing is blocked, or if they fear they might collide with or be collided by some locomotive or string of cars. The reason they do not use it is that the grade is pretty stiff on the approach; also trucks use it, also pleasure automobiles. The ones that do not want to use it just have to wait until the crossing is unblocked."

And again (Rec. pp. 61-62, 63):

"The traffic at night is practically nothing. It is very, very infrequent on all of them, including Sixteenth Street; that is, Sixteenth Street after nine o'clock at night, and on Berry Street after six o'clock at night.

"As to the physical condition of these grade street crossings and the ability of drivers and pedestrians to see an approaching train on the green line, they are wide open crossings; there is no obstruction of the view."

"This green line does not cross any street car tracks, nor any main line railroad tracks of this or any other railroad."

As to the actual handling of the drags Inspector Engels' testimony was:

The movement on November 10 was about a mile, the locomotive hauling ten cars; air hose were not coupled (Rec. p. 55); the movement was from Area "B" on the exhibit to Area "A" (Rec. p. 43). The movement on November 11th was from Area "B" to Area "A", 26 cars, no air coupled (Rec. pp. 43-44) and for about a mile. The movement on that day was at not more than three miles per hour (Cross Ex., Rec. pp. 46-7) although later he said (Cross Ex., Rec. p. 47) speaking of all the movements:

"The engineers would stop these movements with the locomotive and tender brakes. Whether or not it would be a difficult matter to stop a train at a speed of five or six miles an hour on a level track with those brakes would depend on circumstances. I would say that these transfers were operated between five and ten miles an hour. I would not say exactly five miles an hour; they may have exceeded that, or they may not, in some instances."

The movement on November 12th was from Area "B" to Area "A", with 20 cars, the engine pushing them; no air hose connected. The movement on November 13th (Rec. p. 45) was of 8 cars from Area "A" to Area "B"; no air hose coupled. Another movement on November 13th was of 13 cars from Area "B" to Area "A"; they were pushed ahead of the locomotive without coupling air hose (Rec. p. 45). He further said (Rec. p. 47):

> "The type of the locomotives used is what is classified as a switch engine; that is an engine that is customarily used by the Southern Pacific and other railroads in handling cars for the making up and breaking up of trains, called the classification of cars, and the spotting of cars at industry locations, and the taking away of cars from industries. They are equipped a little differently from the so-called road engine which is sent out with a freight or passenger train after that train has been made up; the constructions may be a little different; they are not entirely used as road engines. Still, I have seen a great many road engines used in switching service, engines that were really road engines. When these engines were used in switching service, they were generally equipped as a switch engine, with safety appliance standards."

The testimony of plaintiff's Inspector Engels was amplified by defendant's witness Trainmaster Hopkins, whose qualifications are given at page 52 of the Record.

Trainmaster Hopkins said (Rec. p. 58):

> "I heard Mr. Engels' testimony about how these transfers could be handled with braking power if there were no air brakes coupled up. I do not agree with that testimony. The crew are required by rule to be distributed over the tops of these cars to manually control them by hand brake, if necessary. Ordinarily, the brakes on the engine could handle a drag such as has been described here, running from eight to twenty-six cars, at the speed at which they were operated. The best proof that they could be handled is that they have been handled that way to my knowledge for twenty-five years, without accident."

In his redirect examination he said (Rec. pp. 69-70):

> "The rule under the heading 'With Caution', on page 8 of the Southern Pacific Rules and Regulations of the Transportation Department, reads as follows:
>
> > 'To run at reduced speed according to conditions, prepared to stop short of a train, engine, car, misplaced switch, derailing rail or other obstruction, or before reaching a stop signal; where circumstances require, train must be preceded by a flagman.' "

We have elsewhere said, and we desire again to emphasize in this discussion of the safety features of the case as throwing light on and being one of the reliable criteria of "the essential nature of the work done", that the operations over the green track described by

the witnesses and here challenged as violations of the Safety Appliance Acts were carried on precisely as they had been carried on for many years.

But, to operate drags without air was not the practice throughout the San Francisco yard in cases where the statute if fairly applied to a particular operation would require air hose to be coupled in that operation. Turning again to Plaintiff's Exhibit No. 1 and the explanatory testimony we find that the main passage from and to the metropolitan portion of the San Francisco yard, within which lie areas "A" and "B", is through a series of tunnels which begins with Tunnel No. 1 as located on the exhibit. Trainmaster Hopkins said (Rec. p. 61):

> "Passenger trains coming in and going out of San Francisco from the Third and Townsend Street station use the red line main track entirely. The passenger yard extends from Seventh Street to Third, and are an entirely separate set of tracks from those cited in the complaint; we do not use that for freight purposes. The only freight movement that is made over there is that a drag that is coming in from either Mission Bay unit or the Bay Shore unit going to Sixteenth Street territory pulls down through the interlocking plant and backs out Townsend Street."

The San Francisco yard includes more than the area shown on Plaintiff's Exhibit 1. Mr. Hopkins said (Rec. pp. 53-54):

> "Plaintiff's Exhibit No. 1 does not show all of the San Francisco yard. That yard extends south

from Tunnel No. 1 to San Bruno, including the San Bruno station, and what is known as the old main track via Valencia Street, which includes sidings, at Burnell, Ocean View, Colma, and other spur tracks in that territory, including an area or district known as Bay Shore; that was also the case November 10 to 13, 1930. With the exception of the banana train on Friday night, the usual and ordinary practice of the Southern Pacific Company is to make up and break up freight trains carrying freight southbound from San Francisco, or northbound into San Francisco, at Bay Shore. The banana train is made up in the Mission Bay unit and leaves from that unit. This was also the practice in November, 1930, and prior thereto. There is one general yardmaster, Mr. J. G. Selden, [*Note:* A witness who corroborated Mr. Hopkins' testimony; Rec. pp. 73-4-5] who had at that time, and still has, jurisdiction over the San Francisco yard. He has yardmasters and assistant yardmasters in the various units of yards.

The distance from Tunnel No. 1 to Bay Shore, where these trains are made up and broken up is 4.1 miles. Neither before November, 1930, nor then, nor since then, have road freight trains come into San Francisco as road freight trains. As to how the freight trains which go to make up these road freight trains are taken out of San Francisco toward Bay Shore, and taken from Bay Shore into San Francisco: they are moved in by what is termed a yard drag, a drag service between the two units of the yard; that extends to Mission Bay, Sixth Street, the Belt Line Transfer, the Sixteenth Street industrial territory, and

other industrial territory around the San Francisco terminal. [*Note:* Air is always coupled on those drags, Rec. p. 24.] Referring to Plaintiff's Exhibit No. 1, the Belt Line transfer starts at Second Street and runs toward the Ferry Building. It is shown down here opposite Block 264 and down through that way. It is directly to the south, you might say, of Block 264. The tracks are parallel; the short tracks are spurs. Block 264 is just west of Pier No. 30; it runs from there in a westerly direction up to the point that would be approximately opposite Pier 40.

These drags, as they come into the portion of the San Francisco yard north of Tunnel No. 1, and as they go out through Tunnel No. 1, are coupled with air; they use the main track entirely from San Francisco Tunnel No. 1 to Bay Shore. These drags enter and leave the main track at the area shown as 'A', approximately just west of where Barstow Street is shown; you will notice there is a connection there that goes right through and goes into the main track, indicated by a black line; that is the connection from what we call the switching drill into the main track; they enter and leave the main track through that point."

Further, Mr. Hopkins said (Rec. p. 67):

"Referring to the move of drags of cars to and from Bay Shore when air was used: We have in that service two types of engines, one known as a consolidation type or a road engine that has been converted to a switch engine by removing the pilots and applying foot boards; in that type of

> locomotive the speed on the main track is thirty-five miles an hour. On the switch type it is twenty miles an hour. Twenty miles an hour on the main track is the company's limitations on the speed of these switch engines. Where the engine is pulling a move on the green line shown on Plaintiff's Exhibit No. 1 over this drill track, the speed will average between six and eight miles an hour; when the engine is shoving the cars ahead of it the speed will average between four and five miles an hour. The drags that are moved on the main line to and from Bay Shore will average two or three times as many cars as drags on the drill track."

Thus, the uncontradicted testimony shows that while it would be possible legally to conduct switching, and other operations which the courts have held do not require control by power brakes, upon the double track main line which is shown in red on the exhibit and its continuance southerly through the series of tunnels to the Bay Shore unit of the San Francisco yard, such operations are not conducted on that stretch of track without air hose being coupled and the power brake operative. The reason is not entirely that the red tracks and their prolongation are main line tracks, although it is apparent that that is an important factor. Other reasons are the greater length of the Bay Shore drags (Rec. p. 68), greater speed maintained by the drags in which the air is coupled (Rec. p. 68) as compared with the drags operated over the green line, the greater congestion of traffic on the red

line and its extension through the tunnels, the use of the red track for through passenger trains, and the exclusive use of the green line as a drill track for switching and distributing cars and making up and breaking up trains; in short, that the operation of a string of cars—by whatever name called—on the red track and through the series of tunnels without air being coupled would be contrary to the spirit, if not the letter, of the law.

Appellant's counsel seem unconsciously to feel that the factor of safety is involved in this as in every case arising under the air brake section of the Safety Appliance Act; while explicitly disclaiming such an issue they introduced evidence as to grade crossing protection that could have no relevancy other than to that subject, and conclude Division I (p. 23) and Division II (pp. 25-26) of their brief with arguments that the facts in the case at bar present a situation of unusual hazard.

May we be permitted again to say that our discussion of the evidence in our case bearing on safety is not an attempt to induce this court to set up its own standards of safety in train operation and thereby determine the defendant's guilt or innocence, but is in the belief that in this, as in practically all other reported cases under the Air Brake section of the Safety Appliances Acts, the presence or lack of extraordinary hazard is a strong indication of the "essential nature of the work done".

3. While Expense of Compliance Is Not per se a Defense to a Police Regulation, It Is One of the Criteria In Determining the Reasonableness of a Construction Thereof.

While the trial court declined to hear evidence as to the additional cost of the additional coupling service required to operate "drags" of cars with air brakes fully operative therein (Rec. p. 65), there is nevertheless a general consideration of expense this court may judicially notice and which should be given weight in a case where the very best that can be said for plaintiff's construction is that it presents a doubtful or "border line" situation.

The effect of the construction contended for by appellant would not be confined to the San Francisco Yard of the Southern Pacific Company. The practice complained of is standard at every important terminal on our railroad system where like track arrangements exist. Air hose must be coupled by hand; they do not couple automatically. It is obvious that to couple and uncouple air hose when a drag is made up or broken up or a car cut out or put in, slows yard operation. It requires men to reach between the cars to couple and uncouple the air hose and there is an element of danger as well as delay in that manual operation. In analogous circumstances danger is expressly recognized by Congress in the Safety car-coupler section of the Safety Appliance Acts (U. S. Code, Title 45, Sec. 2). Those are the two principal

reasons why the courts have held that Congress did not mean to include the switching and other car movements that have been excepted by various Supreme Court decisions. Otherwise the courts would have clung to "the dictionary definition of 'a train of cars'" (*Louisville and Jeffersonville Bridge Case,* 249 U. S. 534, 63 L. ed. 757), as the Safety Appliance Act uses the word "train" without qualification. But the same case (page 540) holds that it is the "essential nature of the *work* done" that is determinative—not the name given by a yard official or a Bureau inspector to the collective unit of locomotive and cars.

Passing the question of safety, which is claimed to be improper for us to argue here, the obvious fact remains that in the aggregate on a large railroad system the additional cost of air-hose coupling neither legally required nor—in the judgment of the railroad officials —required for safety, would be very large.

That is a sound objection to the laying down of a rule in a quasi-criminal proceeding which is not clearly within the spirit as well as the letter of the safety statute. The objection is not controlling, but it is ponderable.

The Transportation Act of 1920 (U. S. Code, Title 49, Sec. 15a) enjoins on the carriers economical management of their transportation facilities. Mr. Justice Brandeis said of that provision and its cognate clauses (*Davis v. Farmers Co-operative Co.,* 262 U. S. 312, 67 L. ed. 996):

> "Avoidance of waste in interstate transportation as well as maintenance of service has become a direct concern of the public."

This court is asked by appellant to place a construction on the Safety Appliance Act that will result in widespread additional and, as we believe, unnecessary expense—an expense so obvious as to require no proof and to be within that judicial notice that declines to close the eyes of the court to ordinary and every-day practices and their necessary results.

True it is that added expense, or "uncompensated obedience" (232 U. S. 548) is not a defense *per se* to a police-power statute otherwise valid.

But we are here asked to submit an administrative construction of a statute which hitherto has not been, as to the San Francisco yard or other yards in like situation, insisted upon by the body to whom such enforcement is delegated. And when that construction is insisted upon we may well bring up the matter of an expense which is obvious and which hitherto we have not been required to bear; we are justified in urging that as one of the reasons why the construction sought by the appellant should not be placed on the yard operations involved in the case at bar.

The defense of unreasonableness is always available in a civil action or criminal proceeding to enforce a police-power statute, however definite the terms of the statute may be. It is similarly available when an un-

reasonably broad construction is sought to be given to the statute. Expense of compliance is always one, though only one, of the criteria of reasonableness.

It was said by Mr. Chief Justice Hughes in the recent *Los Angeles Depot Case (Atchison etc. Ry. v. Railroad Commission of California,* 283 U. S. 380, May 18, 1931), on pages 394 and 395, concerning the police power of the state to "require railroad companies to provide reasonably adequate and suitable facilities for the convenience of the communities served by them":

> "But the power to regulate is not unlimited. 'It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.' (citing cases) The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. (citing cases) *And 'the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order'* (citing cases.)" (Italics ours.)

In the *Los Angeles Depot Case* the order to build a depot was not attacked under the Commerce Clause but under the Fourteenth Amendment (283 U. S., opening sentence to "Third", p. 394).

The need for economy—efficiency and safety, of course, being paramount—is not idly urged by us. The deplorable state of the railroads in 1931, which progressively and substantially has grown worse since that time, was judicially noticed by the Supreme Court

in the *Grain Rate Case (Atchison, Topeka & Santa Fe Ry. Co. v. United States,* 284 U. S. 248, January 4, 1932), in which the change of conditions that has brought that about is emphasized (p. 260) by Mr. Chief Justice Hughes, speaking for the entire court, as the "contemporary fact, dominating thought and action throughout the country".

The considerations we dwell upon in this branch of our brief cannot be lightly disposed of by appellant's counsel by concluding (p. 26) that but little time would have been required to have coupled the air hose. The *de minimis* maxim has no application here. It begs the question which on this branch of the case is whether the court, in a case, which at the best for the plaintiff is far from clear, should compel a practice which if applied to thousands of similar operations during the course of the year would obviously create a large expense. That expense is "an important criterion to be taken into view in determining the reasonableness" of the extent to which the national police power is claimed to be applicable to the facts in this case and closely similar cases.

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4. The Leading Cases, Fairly Considered, Show That the Movements on the "Green Track" Were Not Train Movements.

We first question the accuracy of the frequent and persistent use by appellant's counsel of the expressions "transfer movements" and "transfers" to de-

scribe the "essential nature of the work done", which is "the controlling test of the statute's application" (*Louisville and Jeffersonville Bridge Co. v. U. S.*, 249 U. S. 534, on p. 540; 63 L. ed. 757, 2nd col., p. 759).

The expressions are misleading if by their use it is intended to convey the thought that the movements were not of a class which the Supreme Court has held not to be "train" movements.

In a broad sense, every movement of a car from one position of rest to another is a "transfer movement" regardless of purpose, designation or motive power. The car is "transferred" when it is moving in a through or local freight train under load and bill of lading, when it is being hauled to a spur or side track for loading or unloading, or when, alone or with other cars, it is being placed in or taken out of a train. But in none of those senses do counsel use the term; they try to identify the movements in question with the movement of "transfer *trains*" as that expression is applied to the facts summarized in several of the reported cases where the facts differed materially from those in the instant case.

Our contention is, and the trial court substantially held, that the movements were distinctly of the excepted classes in the mind of the Supreme Court when it said in *United States v. Northern Pacific*, 254 U. S. 251, that "a moving locomotive with cars attached is without the provision of the Act only when it is not a train *as where* the operation is that of switching, classi-

fying and assembling within railroad yards for the purpose of making up trains". Under familiar rules of construction the words that follow "as where" are to be taken as merely illustrative, not as exclusive. If the court had said "*only* as where" the definition would undoubtedly exclude any operations except those of "switching, classifying and assembling cars within railroad yards for the purpose of *making up* trains". Such was not the Supreme Court's intention because trains must be "broken up" as well as "made up", and to *break up* a train, cars must be switched and classified and disassembled; there are, also, other operations than the mere actual breaking up and making up of trains that are of the same character and for the same general purpose as switching, classifying and assembling cars, and consequently such operations are not within the prohibition of the Act.

We welcome the citation of *U. S. v. Erie R. R. Co.,* 237 U. S. 402, 59 L. ed. 1019, because it definitely supports our contention. Said the court (our italics):

> "It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which has been assembled and coupled together for a *run or trip along the road.* When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. *But it is otherwise* with the various movements in railroad

> yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements but *mere switching operations,* and so are not within the air-brake provision."

Counsel for appellant print the same excerpt on page 6 of their brief in the case at bar. While the court held in the *Erie* case that the movements were train and not switching movements, it is important to note from the court's statement of facts that the trains were "made up in yards like other trains"—which is not our case,—"proceeded to their destinations over main line tracks used by other freight trains both through and local"—which is again not our case; further that the Erie trains "were not moving cars about in a yard or upon tracks set apart for switching operations, but were engaged in *main line transportation*"—an essentially different state of facts from that in the case at bar. The court then proceeded to discuss the element of hazard to which we advert elsewhere in this brief.

The chief point of similarity between the case at bar and the *Erie* case, supra, is thought by counsel for appellant (p. 6) to be that in neither case were cars set out between the time the engine coupled on to the string of cars and its leaving them and proceeding to other work. That was not controlling there and, as we shall show is not here.

Let us briefly examine the facts in the *Erie Case:* There the movements in question were between three independent yards, one of which was in Jersey City. In that yard there were sixty tracks, in the Weehawken yard eighty tracks, and in the Bergen yard one hundred and fifteen tracks. The yards were independent of each other and were connected by double main line tracks used by other through and local trains. They were in actual practice treated as separate yards. Trains had to pass through a dark tunnel over switches leading to other tracks and across passenger tracks whereon trains were frequently moved. No cars were switched out of the transfers at any time because the transfers moved for delivery from one yard to the other; they were separate and unitary operations. Each yard was a regular station at which freight, both local and interstate, was accepted and delivered, as shown in the Erie's tariffs.

Companion to the *Erie Case* in principle and authority is the *Burlington,* or *Kansas City Case* (*U. S. v. C. B. and Q. Ry.,* 237 U. S. 410; 59 L. ed. 1019). There the movement was within Kansas City, and between two freight yards, on opposite sides of the Missouri River over a main line track connecting them, which was a track by which passenger and freight trains entered and left the city. Each train was moved as a unit from one yard to the other and not infrequently was both followed and preceded by other trains, passenger and freight. The distance be-

tween the two yards in the city was about two miles and the trains passed over a single track bridge a distance of three thousand feet, intersecting at grade twelve or fifteen tracks of other companies and passing through the union depot company's tracks. The trains in Kansas City usually consisted of an engine and thirty-five cars, moving as a unit over a considerable stretch of main line track which was a busy thoroughfare for passenger and interstate traffic. That was clearly a "run or trip along the road".

Counsel then rely on the case of *Louisville and Jeffersonville Bridge Co. v. United States,* 249 U. S. 534, 63 L. ed. 757, which concludes by saying that "the controlling test of the statutes application lies in the essential nature of the work done". They lift from the opinion and isolate the language quoted on page 7 of their brief without applying the statement of facts that precedes the discussion by the court as to whether the movement was a train movement.

In the *Bridge Company Case* which related to a movement in the City of Louisville, the trip consisted in moving a train with an engine and twenty-six cars from a large terminal yard of Louisville & Jeffersonville Bridge Company, constituting the joint terminal of the Big Four and Chesapeake & Ohio systems of railway, over a main line track to a track of the Illinois Central Railroad Company, used as a main line by both the Big Four railroad and the Chesapeake

& Ohio railroad, at a speed of fifteen miles an hour over four city streets at grade and stopping them on a main track; then, reversing the engine, the train was moved over the track of the Chesapeake & Ohio over three city streets and stopped. Again reversing, the train was moved over three city streets on the main line track of Chesapeake & Ohio and then into the Illinois Central yard where the cars were delivered. The delivery of a train of cars in such circumstances from the yards of one company to the yard of another over tracks used by three other companies was without a doubt a train movement and is clearly distinguishable from the movement involved in this case.

We feel impelled to remark that on the facts of that case the Supreme Court was asked to adopt as strained a construction of the act in favor of the bridge company as this court is asked to adopt on the facts in the instant case against the Southern Pacific Company. The difference between the two cases is not only marked by the fact, as stated by the court and accented by appellant's counsel, that the movement in the *Bridge Case* was "a transfer of the twenty-six cars as a unit from one terminal *into that of another company for delivery,* without uncoupling or switching out a single car", but also in the use of main lines as described in the statement of facts, and in the extraordinary and unusual hazard, apparent from the facts and commented on by the court following counsel's quotation; all of those considerations marked the case as one clearly within the spirit of the act and present-

ing all of the hazards the act was intended to minimize.

In the *Northern Pacific or Duluth Transfer case* (*U. S. v. Northern Pacific,* 254 U. S. 251) there were two movements: one with an engine and forty cars, and the other an engine and forty-eight cars, the one being the reverse of the other. In the first movement the train started from the Furnace yard of eleven tracks, passed through the Berwind yard and the Boston yard to the Rice's Point yard, a distance of about four miles. In making the movement it was necessary to use tracks over which passenger and other trains of three other lines were hauled, the Duluth South Shore & Atlantic, the Soo Line, and the Duluth & Transfer Railway, besides other trains of the Northern Pacific Company itself. The railway lines of the Duluth, Winnipeg & Pacific and the Duluth, Missabe & Northern, and the Minneapolis, St. Paul and Sault Ste. Marie were crossed in addition to the crossing of highways and street car tracks. The particular track used was also used for hauling trains hauling logs of the Duluth & Terminal Railway and the trains of Duluth, Missabe & Northern containing coal and lime. The trains were taken as a unit from the Furnace yard to the Rice's Point yard and delivered, being placed on tracks for the purpose of being switched by other engines. Again there is an almost complete lack of factual analogy between the cited case and the case at bar.

In the *Minneapolis* or *Great Northern Case* (Great *Northern Ry. v. U. S.,* 288 Fed. 190) an examination of the record and briefs shows a very marked distinction between that case and this case. There were several yards involved,—the "O" and "P" and "Hay" yards. Twenty-four cars were moved from track six in the "P" yard past the "O" yard to a point where the train entered upon one of the four main lines several hundred feet west of the Lyndale Avenue Bridge. Proceeding easterly it was moved along and over main track No. 4 until it reached a cross-over between main tracks Nos. 3 and 4 just westerly of that bridge, then across over to and on main track No. 3 for a short distance under the bridge, then by another cross-over reached main track No. 2 just east of the bridge and proceeded along that track for three or four hundred feet. It then crossed over to main track No. 1 where it moved for about 200 feet until it reached the lead switch into the Hay yard. At this point thirteen cars were set out on main track No. 1 and the other eleven cars were placed in the Hay yard. *The carrier's testimony in that case was specific that those yards were separate and distinct; that the movement was a delivery from the "P" yard to the "Hay" yard, and that it was not made for the purpose of reaching any industry.* There were no cars picked up or set out enroute and no placing of cars to industries. There were different leads to each of the yards. The "P" yard from which the train moved was used for the purpose of getting cars together for different transfers to dif-

ferent units of various yards of the company in Minneapolis. The transfers were brought in to the yards by the Minneapolis & St. Louis Railway transfer, the Minneapolis Eastern, the Chicago, St. Paul, Minneapolis & Omaha, the Northern Pacific, and the Northfield & Southern. The yardmaster testified that transfer trains were moved from the "Hay" yards down to the "P" yards. *The movement was against the current of traffic on the westbound main line.*

Appellant cites the most recent air-brake case in this circuit, that of *United States v. Northern Pacific Railway* (December 18, 1931, C. C. A. Ninth Circuit) 54 Fed. (2d) 573. The citation is helpful to appellee as a contrast to the operation involved in the case at bar. The appellee Northern Pacific Railway was not held guilty of violation of the statute except for a movement of five cars from side tracks in the vicinity of the depot and a return movement with two loaded oil cars along the same route to the depot yard. The movement condemned was on the main line for a distance of somewhat over half a mile, crossed several city streets used by pedestrians and vehicles and "for at least one-third of a mile the main line used ran through the center of Wishkah Street, which was the main highway for automobile traffic between Tacoma and Hoquiam." The exhibit map shows that on these blocks of that stretch were tracks jointly operated by three railroad companies. This court, speaking through District Judge James, concludes by saying (page 574):

> "In the transfer of cars from railroad yards to nearby points, or to other yards of a railroad company, where the main line is traversed for substantial distances, the railroad company is not authorized to claim that the movement is merely one of switching, which will fall without the provisions of the act. United States v. Erie Railroad Company, 237 U. S. 402, 35 S. Ct. 621, 59 L. ed. 1019; Great Northern Railway Co. v. United States, 297 F. 692 (C. C. A. 9). The authorities cited, we think, fully sustain the conclusion before stated. It is proper to state, if what has been said in this opinion is not already clear to the point, that we do not intend to hold that during the actual switching operations, at either of the places where cars were left or picked up, power brakes were required to be connected between the engine and cars; nor that the use of the main line for switching or assembling trains, within the railroad yards, would bring such movements within the statute provisions."

Neither the statement of facts nor the conclusion in that case in any way impairs our defense here.

Practically all of the cases referred to in Appellant's Brief in support of their contention that the movements complained of were train movements were cited to the trial judge. He first listed them on page 26 of his opinion as printed in the transcript of record and then proceeded to show that they do not control the case at bar because the facts in each of them differ from those peculiar to the movements in the San

Francisco yard. We refer to the analyses thereof made by the trial judge, calling particular attention to the importance he gave the fact that the green track shown on Exhibit A was a track "in fact set apart for switching operations" (Rec. p. 29) and to his statement on page 30 (italics ours):

> "In the *Northern Pacific case* (254 U. S. 251) the Supreme Court said:
>
> > 'A moving locomotive with cars attached is without the provisions of the act only when it is not a train; as where 'the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains.'
>
> From this it does not necessarily follow that a movement of cars as in the case at bar is a train within the meaning of the statute where such movement *is on a line which has no other connections except with switching tracks and which line in purpose and reality is but an extension of such switching tracks.*
>
> In the *Great Northern case* (288 Fed. 190) the court said:
>
> > 'The mere fact that the Railroad Company designates a large stretch or tract as yard does not make every operation therein a switching operation. If so, the act could be avoided by including large areas in the term yard.'
>
> The two portions of the yard, designated units in the case at bar, present quite a different situation than is presented in the *Great Northern case* (288 Fed. 190). *The question whether it be a*

train or a switching movement must be determined by the peculiar facts of each case. If the entire movement is within a designated yard that is a fact to be considered with other pertinent facts. As said in the *Illinois Central case* (14 Fed. (2d) 747):

> 'The decisions turn upon the particular facts of each case. All of them contain many varying and conflicting factors, *no one of which alone is controlling.*' "

In the *Wenatchee case,* referred to by appellant's counsel (*Great Northern v. United States,* 297 Fed. 693; C. C. A. 9th Circuit), two strings of cars were first assembled and then moved from one yard, Appleyard, over a track used for moving westbound through freight trains over it, to another yard, the old yard, a distance of 8000 feet.

> "An outstanding material fact is that, *after the cars were assembled in the eastern yard the engine and six cars were operated as a unit over lines used by all through freight trains,* and the unit crossed over the main line used by all passenger trains and across several city streets. *In its entirety the movements involved operations on tracks not set apart for switching operations,* and we must conclude that they were train movements, rather than switching operations."

After referring to the *Erie* and *Burlington Cases* the court said:

"Applied to the facts in the present case, the rule of the decisions cited leads us to hold that the railway company *was not moving cars about in a yard or on tracks set apart for switching operations at Wenatchee, but moved the train between two yards over a considerable stretch of main line,* and unless the engineers could readily and quickly check or control the movements of the trains they were exposed to hazards which the statute covered, and they also became a danger to the safety of other trains which the statute was equally designed to protect."

Appellant's counsel also cite *Chicago & Erie Railroad Co. v. United States* (C. C. A. 7th), 22 Fed. (2d) 729. In that case, after reviewing the standard decisions, the court said (italics ours):

"Possibly no exact rule can be laid down by which it can, in all cases, be determined whether there is a train movement or a mere switching operation. In this case, whether the three sections constituted one yard or three yards, we think, is immaterial. We have here these facts:

After the west-bound train in question came to Section B of the Huntington yard, and the train had been broken up and distribution of cars made pursuant to instructions, 28 cars remained in section B of said yard for movement to and further switching in section C. The switch engine was attached to the 28 cars and 'moved from the north (or west) end of section B of the defendant's yard out onto its west-bound main track,

used by its through freight and passenger trains, and northward (or westward) along said main track for a distance of 1,500 feet, at which point it entered section C of defendant's yard and continued northward (or westward) over its switching lead and No. 10 track, a distance of approximately 2,850 feet'.

That westbound track was 'the only track connecting section B with section C of the Huntington . . . The air hose between the tender of the locomotive and the first car were not coupled . . . No stops were made for the purpose of setting out, picking up or otherwise switching the cars . . . After the train . . . arrived at the point in section C of said yard designated as F on Exhibit 3, the crew proceeded, without delay, to classify and deliver the 28 cars on the various tracks of section C.'

In addition to a number of freight and passenger trains 'there are from 35 to 40 movements of engines and cabooses, pusher engines or engines with cars attached each 24 hours, in both directions, on the westbound track,' over which the movements in question were made. There were numerous street crossings and a railroad crossing at grade, over which numerous trains passed daily. An engine and 28 cars would make a train approximately 1,000 feet long.''

The difference in the facts between the case just cited and the instant case is so obvious as to require no further comment.

Appellant's counsel further cite *Chicago, St. P., M. & O. Ry. Co. v. United States* (C. C. A. 8th), 36 Fed. (2d) 670. There the facts were:

> "Sixteen cars were assembled on what is known as the Burlington exchange track, located in what the railroad terms the south part of its yards in Omaha. These 16 cars were moved, as a unit, by a locomotive of the railroad commonly used for switching purposes north for 1¼ miles to where the railroad's freight trains were commonly made up. During this movement no cars were picked up or set out, no switching was done, and one stop was made at a railroad crossing. Four city streets used by the public were crossed, and two tracks of the other railroads, not used for main line traffic, were crossed. The track over which the movement was made was a lead from the interchange track, on which the cars were assembled, to the north yard. None of the cars had their brakes so connected as to be operated as required by the Safety Appliance Act."

That case is a somewhat rigorous application of the *Louisville and Jeffersonville Bridge Case* upon which the Circuit Court of Appeals relied in holding the movement to have been a train movement. The facts are not stated as fully as they might have been with respect to the character and ordinary use of the mile and one-quarter lead track over which the unit was moved. Apparently the controlling factors in the mind of the court were the crossing of four city streets and two tracks of other railroads and the fact

that practically none of the track over which the movements involved were made was, as in the instant case, a track set apart for switching operations. Be that as it may, the case on the facts stated is an extreme one and not in harmony with the consensus of authority as we have endeavored to bring the cases together in this brief. Probably too much stress was laid by the defendant on the contention that a movement to be a train movement must be upon main line tracks, which contention had been finally and adversely disposed of in the *Northern Pacific case* (254 U. S. 251) and by the same Circuit Court of Appeals in the *Illinois Central case* (14 Fed. (2d) 747).

There remains in counsel's brief the unreported case of *United States v. Northern Pacific,* No. 12213, decided by Judge Neterer on December 1, 1928. From the statement of facts it seems that the movements "without air" of units of 10 to 17 cars for about a mile and one-half along the Seattle waterfront were made between distinct yards or to or from piers to or from the railroad company's yards. There was present in some of the counts the element of delivery from or to another carrier, but, more than that, any one who is even slightly acquainted with the Seattle waterfront will realize that there must have been unusual hazard from several sources.

Reference to Judge Neterer's opinion will show that most of the movements were lengthwise of streets, particularly Railroad Avenue. We are informed by counsel

for defendant in that case that the photographic exhibits in the case showed the great lengthwise use of streets, Railroad Avenue, Railroad Way, pavements, car tracks, and railroad crossings of the O. W. R. & N. Ry. and the Pacific Coast Railway, and that in the Government's brief in that case stress was laid *inter alia* on the following contention:

> "Most of the trackage involved in our case is *along* city streets, mostly planked or bricked, *used indiscriminately both by the carrier and also by vehicular traffic and pedestrians.*"

The movements could not have been termed intra-yard movements in any sense of that expression and they were not, as here, upon tracks used within a general yard entirely for switching purposes.

Courts have had occasion to define "switching operation" or "switching movement" in other classes of cases than those under the Safety Appliance Acts. It has been held that:

> "The test of distinction between 'transportation' and 'switching' service of freight cars for which different rates are set by State Railroad Commission is not only whether the switching service follows transportation, but whether movement of cars is under the yardmaster's direction, in which case it is switching service, or under trainmaster's direction, in which case it is transportation service." *St. Louis, I. M. & S. Ry. Co. v.*

Clark Pressed Brick Co., 192 S. W. 382, 384, 127 Ark. 474.

" 'Transportation service' is one which requires no other service to complete shipper's object, while 'switching or transfer service' is one which precedes or follows transportation service, regardless of whether or not it involves use of portion of carrier's main line or that of another." *Andrews Steel Co. v. Davis,* 276 S. W. 148, 150, 210 Ky. 473.

"The word 'switching', as used in section 9000, Gen. Code, applies only to the movements within the terminal limits of a municipality of freight cars when incidental to the shipment as a whole or to the main journey, and has no application to shipments from one railway to another within the terminal limits of a municipality." *Cincinnati, N. O. & T. P. Ry. v. J. B. Doppes' Sons Lumber Co.,* 4 Ohio App. 22, 25, 35 Ohio Cr. Ct. R. 453.

"A switching service or transfer service is one which precedes or follows a transportation service and applies only to a shipment on which legal freight charges have already been earned, or are to be earned. The word 'switching' is synonymous with 'transferring'." *J. B. Doppes Sons Lumber Co. v. Cincinnati, N. O. & T. P. Ry. Co.,* 110 N. E. 640, 642, 92 Ohio St. 206, L. R. A. 1916D, 452.

We do not contend that the tests described in the cases just cited are exclusive; they are however among the sound and standard distinctions constantly used in railroad operation.

The position of appellant's counsel respecting use of the green track is not helped by their selection of authorities. Eleven cases are cited and relied on in their brief. In all of the Supreme Court cases and in eight of the eleven cases a substantial part of the movement found to be a train movement was over a main line customarily and almost entirely used in main-line transportation service by regular freight and/or passenger trains to which beyond any doubt the air-brake requirements applied and to which they were in practice applied. In six of those eight cases main lines of other railroads were also crossed. The remaining three cases not so clearly distinguishable from the instant one (14 Fed. (2d) 747; 36 Fed. (2d) 670 and the unreported opinion of Judge Neterer) presented, as we have shown, situations the court thought to be of unusual hazard although as we have said the 36 Fed. (2d) may fairly be regarded as an unreasonably strict application of the Supreme Court decision on which it relies.

In the case in the 14th Federal (2d) the movement was over a single lead track 4500 feet in length which was the only connection between two distinct yard units. "Tracks on other railroads were crossed at grade" and "that part of the yard at least was used by other railroads and was not the private property of the plaintiff in error". The outstanding differences between the Seattle case (the unreported decision) and the case at bar have been pointed out.

Considering the authorities as a whole and applying them to the facts in the case now before us, it is evident that

the trial court correctly concluded that the movements were essentially switching and not train movements.

Further summing up the authorities relied upon by counsel for the appellant—and they are the leading authorities on the question—we think it fair to say:

a. That no one fact or circumstance controls the application of the air brake section. In each case, as stated by the trial court, "the question whether it be a train or a switching movement must be determined by the peculiar facts", and, as said in the *Illinois Central Case* (14 Fed. (2d) 747):

> "The decisions turn upon the particular facts of each case. All of them contain many varying and conflicting factors no one of which alone is controlling."

b. While it is true, as stated by counsel, that the "character of the track, whether main line or not, is not controlling", nevertheless the track used by the particular unit is often, as in the instant case, of great, if not unusual, weight in determining "the essential nature of the work done".

c. It is true, as also stated by counsel, that switching may be done on a main line, but that is not important in this case because the green line was not a main line. It is equally true that where an operation is

carried on over such a track as the green track there is a strong, but not controlling, factual presumption that the operation is not a train operation.

d. Appellant's counsel say:

> "2. A movement for a considerable distance of a number of cars as a unit without uncoupling or switching out a single car and which movement is not a sorting, or selecting or a classifying of the cars is not a switching movement." (Applts. Brief, p. 20.)

A movement for a considerable distance of such a unit without uncoupling or switching out a single car may or may not be a train movement but whether cars are uncoupled and switched out is only one factor to be considered. Whether it is a train movement also depends on other circumstances of equal or greater weight. The entire unit of work continuously performed must be considered. *The courts have not prescribed and in the nature of things cannot prescribe any distance which a drag may be moved or a switching operation conducted without coupling air.* They have considered all the circumstances, including the making up and breaking up of the drag as well as whether the movement under review was merely part of a larger unit of work that could fairly be called a switching operation.

Appellant's counsel attempt to surmount the obvious difficulties presented by the character of the green track by impliedly arguing that the controlling fact is that in the

movement thereover—which was merely part of a unitary switching operation—no cars were set out of or taken into the drag. That has never been regarded by a court as the controlling factor; its significance has been adverted to, but only in connection with the other facts. Obviously any switching movement must proceed **SOME** distance without setting out or picking up a car. Congress has not said what that distance may be before the movement becomes a train movement although it might do so, as have state legislatures in analogous statutes such as "full crew laws". The courts have not lineally defined a train movement; indeed it is not possible for us to see how they could do so. It is much fairer—much more consistent with the spirit of the act—to say that if any one fact is to be given preponderating weight in the instant case it is the purpose, character and daily use of the green track.

e. While it is true, as stated by counsel, that a train movement within the act may be made without time tables or block signals and with a switching engine and a yard crew, yet the fact that the given movement is so made is strong evidence, when taken into account with the other surrounding circumstances such as those that appear in the case at bar, that the movement is not within the act.

f. We do not question the statement that the railroad cannot by designating a large area as a yard relieve itself from the operation of the act on all movements of strings of cars within that area. But we do say that the fact that a given movement is within a

yard of reasonable dimensions and between units of that yard used for distinct purposes requires substantial evidence to overcome the natural presumption that it is not a train movement.

On the undisputed facts of record the Government has not brought the case within any of the reported cases. If one attempts to compare any of them with the facts in the case at bar important differences are at once evident and we believe the learned trial judge correctly came to the conclusion (Rec. p. 32) "that 'the essential nature' of the movements in question was switching and not train movements' ".

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5. The Assignment of Error in Permitting Evidence of Comparative Safety Does Not Call for a Reversal.

The only intermediate error assigned by appellant is that the trial court permitted a defendant's witness to answer, over objection, a question as to whether the operation complained of was safe or unsafe (Appellant's Brief, pp. 3-4, discussed on pp. 24-26).

In a strictly technical view of the issues the question, as framed, may have been improper; counsel cite cases to that effect (Appellant's Brief, p. 24). In another view the question was proper, at least as rebuttal, because the plaintiff had already offered evidence (Rec. pp. 44-46) as to the grade crossings traversed and their protection, and also argue in their brief that

there is a hazard caused by fog, both of which can have no other purpose than to support a claim that there was an unnecessary hazard in the operation as conducted.

Moreover, as we argue under division 2 of this chapter, the court was entitled to consider the question of comparative hazard in determining the "essential nature of the work done".

But even if the trial judge should have sustained the objection to the question as propounded, his failure so to do does not call for a reversal.

The case was tried *without a jury,* which had been duly waived (Rec. pp. 23-24). After submission the trial judge filed an opinion in which, seemingly in direct response to the testimony admitted over objection and as to which error is assigned, he held:

> "In so far as the question of hazard is an element in cases of this character the evidence is without conflict that because of the necessity of slow speed in the movements in question the hazard would not be reduced by utilizing the air brake appliances, but upon the contrary would be increased."

The opinion was filed on November 27, 1931 (Rec. p. 32). On December 14, 1931, Judge Norcross wrote the clerk a letter, a copy of which appears in the stipulation at page 34 of the record; by that letter he expressly eliminated from his opinion the paragraph next above quoted. The copy of the opinion printed in

the transcript of record shows that that paragraph was eliminated from the original opinion by the clerk drawing lines through it (Rec. p. 35). At no other place in the opinion does the learned trial judge discuss, or express any conclusion as to, the question of safety. He made no finding on the subject and concluded his opinion by saying (Rec. p. 32):

> "The conclusion reached upon the facts presented in the case at bar is that 'the essential nature' of the movements in question was switching, and not train movements.
>
> Judgment for defendant."

Giving proper weight to the circumstance that the case was not tried before a jury and that therefore we *do* know from the trial judge's written opinion and his amendatory letter what evidence was considered by him in coming to his conclusion, we respectfully submit that it is apparent that the ruling, even if error, was harmless. "Mere error is not enough to require reversal of the judgment, if the record discloses that no injury could have resulted therefrom" (*Carlyle Packing Co. v. Sandanger,* 259 U. S. 225, 66 L. Ed. 927). Nor will a decision of a lower court be reversed, if correct on the merits, merely because the lower court has intermediately erred in exclusion or acceptance of evidence (*Stover Mfg. Co. v. Mast, Foos & Co.,* 89 Fed. 333, 32 C. C. A. 231, affirmed in 177 U. S. 485, 44 L. Ed. 856; *Aetna Indemnity Co. v. Crowe,* 154 Fed. 545, 83 C. C. A. 431, certiorari denied in 207 U. S. 589, 52 L. Ed. 354; *Wiener v. Union Trust Co.,* 261 Fed. 709); and the

same result follows even where the trial was before a jury if it appears, as we claim here, that the complaining party on appeal was not entitled to succeed in any event (*Donohue v. Boston & Maine R. R.,* 209 Fed. 824, 126 C. C. A. 548; *Vagaszki v. Consolidated Coal Co.,* 225 Fed. 913, 141 C. C. A. 37; *Howland v. Corn,* 232 Fed. 35, 146 C. C. A. 227). Appellant admits that "the sole question involved in this case is whether the five transfer movements were train movements . . ." (Appellant's Brief, "C", p. 4).

But counsel for appellant do not claim that the ruling was prejudicial. They assert merely (Appellant's Brief, p. 25):

> "From the foregoing citations it is evident that the admission of the testimony objected to was clearly inadmissible, and it was therefore error to permit the question to be answered. In addition the introduction of such testimony tends to becloud the issue and should for that reason have been excluded."

Moreover, the trial judge reserved his ruling on plaintiff's motion to strike out the answer to the question the allowance of which is now assigned as error (Rec. p. 67), and the effect of the amended opinion of the trial court is the same as though the motion had been granted. It is analogous to instructing the jury to disregard testimony after refusing to strike it from the record, which was held in this circuit to cure the error in denying the motion to strike (*United Verde etc. Co. v. Littlejohn* (C. C. A. 9th Cir.), 279 Fed. 223.

Curiously enough, while counsel argue on page 24 of their brief that the considerations of safety were for Congress and that the duty imposed is absolute and cannot be obviated by adoption of equivalent requirements, they almost immediately proceed (page 25) to argue that San Francisco is subject to dense fogs that make all kinds of traffic hazardous, and elsewhere (Appellant's Brief, p. 23) they argue that the crossings of streets at grade made the movements more than ordinarily hazardous.

We respectfully submit that if the trial judge was correct in holding that the movement in question was not a train movement, the defendant's attempt to answer the plaintiff's grade crossing testimony was without prejudice to the plaintiff or effect on the judicial mind or the decision on the merits. Moreover the question of comparative safety is, as we heretofore argue, proper to be considered as bearing on the question of "the essential nature of the work done".

In Conclusion.

We feel that, even if the law be given the broadest construction contended for by counsel in its application to the facts, it is apparent that a clear case of violation of the power brake section of the Safety Appliance Acts was not presented by the evidence. The physical facts were undisputed and indisputable. Had the case been a clear one of violation it would have

proceeded no further than a plea of guilty; such is the usual result of cases of this character which almost always arise from careless practices or a misconstruction of the law by railroad officials which has been perversely insisted upon in the face of warnings. The background of this case is entirely different. The movement over the green track was but a part of a larger unit of movement which was aptly described by the trial court as having the essential nature of a switching movement. No movements occurred over or across a main line. The green track itself, as characterized by the trial court (Opinion, Rec. p. 30) "in purpose and reality is but an extension of such switching tracks"—the tracks shown in areas "A" and "B". A practice of long standing is here attacked under what we believe to be an extreme and unreasonable construction of the statute. The appellee has genuinely attempted to comply with the law in its San Francisco yard operation. For many years operations over the green track such as those here challenged have been carried on in the same manner as that now sought to be condemned, but during the same period operations of drags over the parallel and adjacent red main line have been performed with the air hose coupled and the power brake operative.

No case under the air brakes section that has found its way into the books is so free from cause to characterize it as one of unusual hazard. A reversal in this case would necessarily require the defendant in the move-

ments complained of and all similar movements to apply the statute to an extent hitherto not contended for on a similar state of facts. In effect it would ascribe to Congress an intention in the use of the word "train" that we do not believe existed in the legislative mind; putting the thought differently it would by judicial construction enlarge the jurisdiction of the Commission to include a field of yard operation which at least so far as this defendant is concerned it has not up to this time attempted to occupy. It would not have been difficult for Congress to prescribe as cases arose from time to time some or all of the tests which counsel for plaintiff now claim are controlling on the question of whether a given movement is a train movement, but the fact remains that Congress has not done so, and counsel for the Government should no more be permitted to re-write the statute in the interest of a new and extreme construction than should counsel for the carrier be allowed to break down its spirit and purpose by too liberal an interpretation.

Taking the facts alone and applying to them the language of the statute with the aid of the interpretations thereof made by a long line of authoritative decisions the utmost that in fairness could be said for the case would be that it is somewhere near the dividing line between train and non-train operation. We have defended in the firm belief that it is not even so favorable to the plaintiff—that a judgment in favor of the plaintiff can be ordered only by an unreason-

able and a strained construction of the statute and by the stringing together of isolated expressions from individual decisions upon different states of fact without a consideration of the purpose of the statute, the reasons behind the exemptions settled by the Supreme Court decisions, and all of the surrounding facts and circumstances of the case at bar.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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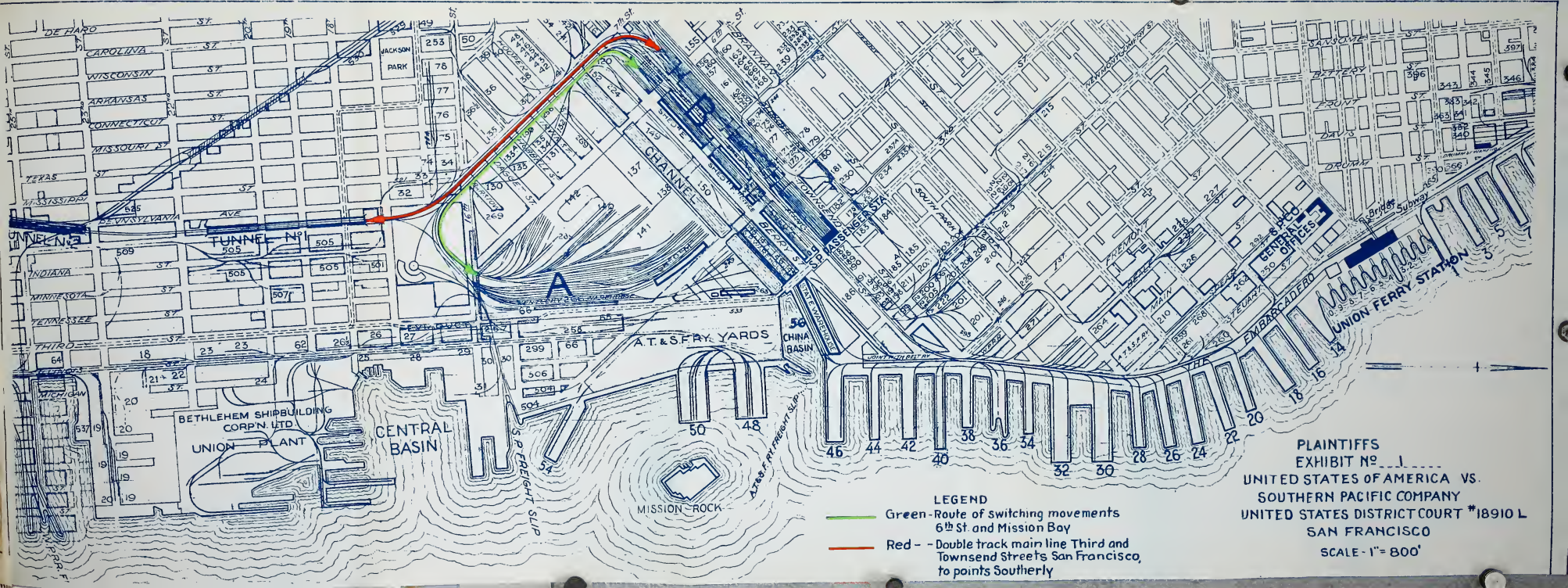
AUGUSTUS G. GOODRICH,

Attorneys for Appellee.

San Francisco, California,
June 17, 1932.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CENTRAL BASIN
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A.T. & S.F. FREIGHT SLIP
MISSION ROCK
S.P. & P.R.R.
S.P. GENERAL OFFICES
BAY BRIDGE
SUBWAY
UNION FERRY STATION
LEGEND
Green - Route of switching movements 6th St. and Mission Bay
Red - - Double track main line Third and Townsend Streets San Francisco, to points Southerly
PLAINTIFFS EXHIBIT No. 1
UNITED STATES OF AMERICA VS.
SOUTHERN PACIFIC COMPANY
UNITED STATES DISTRICT COURT #18910 L
SAN FRANCISCO
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